NO. 33335
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

ALLISON J. RIGGS and
JACK E. RIGGS, M.D.,

Appellants/Plaintiffs,

vs.

From the Circuit Court of
Monongalia County, West Virginia
CIVIL ACTION NO. 01-C-147

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Appellee/Defendant.

BRIEF OF THE APPELLANT

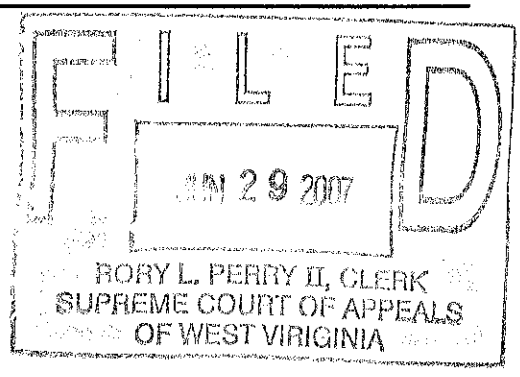

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TABLE OF AUTHORITIES

WEST VIRGINIA CASES

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

The issue on appeal is a legal question of first impression involving the statutory construction of the West Virginia MEDICAL PROFESSIONAL LIABILITY ACT ("MPLA"), W.Va. Code § 55-7B-8 [1986] which imposes a $1 million cap on noneconomic damages.

A jury awarded a $10 million dollar verdict on September 5, 2006, in the Circuit Court of Monongalia County, West Virginia, the Honorable Robert B. Stone presiding, against the Appellee, West Virginia University Hospitals. Inc. ("WVUH"). The Circuit Court held the verdict was not excessive and was supported by the evidence. However, the Circuit Court *sua sponte* reduced the award of Ten Million Dollars ($10,000,000.00) in general damages to One Million Dollars ($1,000,000.00) relying upon an erroneous application of the MPLA noneconomic cap. See *Judgment Order* entered on September 12, 2006, and *Order Concerning Post-Trial Motions and Final Judgment Order* entered on October 26, 2006.

The MPLA noneconomic cap, by its very definition, is limited to health care "rendered...to a patient." See W.Va. Code § 55-7B-8 [1986] (and its definitional counterpart at W.Va. Code § 55-7B-2(d)). WVUH stipulated and argued to the jury that this case does not involve health care rendered to Allison J. Riggs. Consequently, the MPLA does not apply and Appellant seeks reinstatement of the jury verdict.

II. STATEMENT OF THE FACTS OF THE CASE

1. The WVUH Department of Infection Control is comprised of its Director, Rashida Khakoo, MD, and a Nurse Practitioner, Bonnie McTaggert, RN.[1]

[1] The Department of Infection Control is not the same as the Department of Infectious Disease. Infection control is an administrative function designed to monitor hospital acquired infections and implement policies and procedures regarding infection control. Infectious disease, on the other hand, is a discipline of medicine which involves direct patient care. The Department of Infectious Disease employs medical doctors who are consulted on cases. This case does not involve any allegations directed against the Department of Infectious Disease or the failure to consult an infectious disease specialist. The claims are directed entirely against the WVUH Department of Infection Control and do not involve direct patient care claims.

2. The WVUH Department of Infection Control is charged with the duty to monitor nosocomial, or hospital acquired, infections at WVUH. Its "job is to try and make sure that the hospital has policies and procedures that will keep infections under control." See WVUH Opening Statement, August 22, 2006 Trial transcript, p. 144). See also WVUH Policy and Procedure Manual, Infection Control, *Infection Control Practitioner Job Description* (WVUH 001909) (Plaintiff's Trial Exhibit #18).

3. The WVUH Department of Infection Control internally declared environmental epidemics of *serratia*[2] in 1991 and 1993. See Trial Testimony of WVUH Infection Control Nurse Practitioner Bonnie McTaggart, RN, August 24, 2006, p.112.

4. The WVUH environmental epidemics were caused by an "environmental contamination" of *serratia* found most notably in "wet places" such as mop water and spread by cross-transmission. See WVUH Infection Control Committee Minutes (Plaintiffs' Trial Exhibit #20).

5. Appellant presented compelling evidence at trial that the WVUH Department of Infection Control negligently failed to detect and control a third *serratia* epidemic in 1995 which contaminated the hospital environment.

6. Appellant, Allison J. Riggs, is the daughter of WVU physician, Jack E. Riggs, MD, and contracted a near fatal nosocomial *serratia* infection while admitted to WVUH in 1995. She was then fourteen (14) years old.

7. Allison's nosocomial *serratia* infection was cross-transmitted from the hospital environment and originated inside the femoral tunnel of an ACL surgical reconstruction. The *serratia* infection ravaged Allison's knee for four (4) years and resulted in six (6) additional

[2] "Serratia" is a bacteria which causes nosocomial infections. A "nosocomial" infection is an infection acquired from the hospital environment. See WVUH Policy and Procedure Manual Infection Control, *Criteria for Infections* (WVUH 001968) (Plaintiff's Trial Exhibit 10).

surgeries. Allison's life threatening battle to fight the infection caused significant physical, emotional and psychological trauma during her formative teenage years.

8. It is undisputed and stipulated that the WVUH Department of Infection Control does not render care to patients. None of the members of the WVUH Department of Infection Control consulted on the case, none are found in the medical records and none rendered care to Allison Riggs. Importantly, it is not the job of the WVUH Department of Infection Control to treat patients. These facts are undisputed. The theory of liability presented at trial against WVUH, as aptly described by the Circuit Court, involved the "failure to maintain a safe and proper hospital environment with respect to infection control." See August 31, 2006, Transcript of Proceedings, Volume I, at p. 85.

9. A month before trial, the Plaintiffs entered into a settlement agreement with co-defendant WVU Board of Governors ("WVUBOG")[3]. WVUH consented to the settlement and WVUH proffered the following stipulation:

> **In as much as Rashida Khakoo, MD did not provide medical care or treatment to plaintiff Allison Riggs, and inasmuch as Bonny McTaggart, RN did not provide nursing care or treatment to plaintiff Allison Riggs, individual patient care or treatment by agents jointly employed by WVUH and BOG is not at issue in this case.**

See *Order Approving Partial Settlement with University of West Virginia Board of Trustees* at ¶5(e); August 14, 2006 Hearing Transcript approving the WVUBOG settlement; WVUH correspondence proffered to the Circuit Court during the August 14, 2006 hearing attached hereto as Appendix A. WVUH authored the stipulation, presented the stipulation to the Court and requested the stipulation be entered in the record contemporaneous to the approval of the settlement with the WVUBOG.

[3] The WVUBOG employed the orthopedic surgeon who performed the 1995 surgical procedure. Appellant alleged in her *Complaint* the treating orthopedic surgeon failed to timely diagnose the infection which contributed to her injuries. The WVUBOG settlement specifically resolved all direct patient care claims. The case against WVUH does not include claims relating to the failure to diagnose and/or the failure to treat an infection.

10. During the trial of the matter, WVUH repeatedly emphasized to the jury that the infection control claims asserted against WVUH do not include direct health care rendered to Allison Riggs:

(a) TRIAL DAY 1 – Opening Statement by WVUH
WVUH: One of the important things to understand about this case is that Bonnie McTaggert and Dr. Khakoo had no idea who Allison Riggs was until this lawsuit was filed. Their job at the hospital does not include when you are talking about infection control actually treating individuals. (August 22, 2006 Trial transcript, pp. 143-44);

(b) TRIAL DAY 3 – Adverse direct by Plaintiff of WVUH Infection Control Nurse Practitioner Bonny McTaggert:
PLAINTIFF: It's my understanding from taking your deposition that at no time when you were an infection control practitioner did you treat patients in any way?
McTAGGERT: That's never the function of an infection control practitioner.
[…]
PLAINTIFF: In any way, shape or form did you ever treat patients in 27 years?
McTAGGERT: No.
(August 24, 2006 Trial transcript, p.74-75); and

(c) TRIAL DAY 5 – Direct by WVUH of WVUH Infection Control Director Rashida Kahkoo, MD
WVUH: Were you ever involved in Allison Riggs' care while she was a patient at West Virginia University Hospitals?
KHAKOO: I was not involved in her care as a physician. (August 29, 2006 Trial transcript, pp. 11-12);

11. Counsel for West Virginia University Hospitals, Inc. ("WVUH") made the following comments on the record during a discussion of proposed jury instructions regarding the scope of WVUH's duty to Plaintiff:

> WVUH: I think one of the ways to deal with it is to talk about it in terms of Allison Riggs' hospitalization or when she was hospitalized because that's the duty. **The duty is to provide a proper environment while she is there. We are not providing direct patient care to her. The infection control department, their duty has to do with the entire hospital infection control process.**
>
> **So, when I was going through this I had concern about the same thing because there isn't any evidence that any of these people provided direct care to her.**

See August 31, 2006 Transcript, Volume 1, p. 87 (emphasis added). WVUH requested and the Court agreed to strike from the jury instructions the phrase "in the course and treatment" and replace with "relating to the hospitalization of" in recognition of the absence of evidence relating to direct patient care. See August 31, 2006 Transcript, Volume 1, p. 87-88.

12. WVUH concedes the "undisputed" fact that "neither Rashida Khakoo, MD nor Bonny McTaggart, RN provided direct medical care to Allison Riggs." See *WVUH's Response to Plaintiffs' Motion to Reinstate the Damages Awarded in the Jury Order* filed on September 28, 2006, at p. 4.

13. On September 5, 2006, a jury returned a verdict in the amount of Ten Million Eighty-Four Thousand Nine Hundred Eighty-Nine Dollars and Thirty-Nine Cents ($10,084,989.30) including a $10 million general damage award.

14. Judge Stone ruled the $10 million verdict was not excessive and was supported by the evidence. *Order Concerning Post-Trial Motions and Final Judgment Order* entered on October 26, 2006 and Hearing Transcript (September 29, 2006), p.44.

15. However, the Circuit Court reduced the award of Ten Million Dollars ($10,000,000.00) in general damages to One Million Dollars ($1,000,000.00) pursuant to the MPLA noneconomic cap. See *Judgment Order* entered on September 12, 2006.

From this Order your Appellant asserts error and reinstatement of the damages.

III. ASSIGNMENT OF ERROR RELIED UPON AND THE MANNER IN WHICH IT WAS DECIDED IN THE CIRCUIT COURT

The Circuit Court held that this civil action is "governed by the West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1 et seq., including the $1 million cap on noneconomic damages provided for by W. Va. Code §55-7B-8." See *Order Concerning Post-Trial Motions and Final Judgment Order*.

The Circuit Court erred by reducing the general damage award to $1 million pursuant to the MPLA cap on noneconomic damages because the WVUH Department of Infection Control did not render care to Allison J. Riggs.

IV. POINTS OF AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

The issue on appeal is a legal question of first impression involving the statutory construction of the West Virginia MEDICAL PROFESSIONAL LIABILITY ACT ("MPLA"), W. Va. Code § 55-7B-8 [1986] which imposes a $1 million cap on noneconomic damages. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415, Syl. Pt. 1 (1995).

The statute in question is the MPLA cap on noneconomic damages which states, "In any ***medical professional liability action*** brought against a health care provider, the maximum amount recoverable as damages for noneconomic loss shall not exceed one million dollars and the jury may be so instructed." W. Va. Code § 55-7B-8 [1986] (***emphasis added***).

A "medical professional liability action" means "any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services ***rendered***, or which should have been rendered, by a health care provider or health care facility ***to a patient***." W. Va. Code § 55-7B-2(d) [1986] (***emphasis added***).

An analysis of W. Va. Code § 55-7B-8, and its definitional counterpart at W. Va. Code § 55-7B-2(d), begins with the standards for statutory construction. "The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Vest v. Cobb, 138 W.Va. 660, 76 S.E.2d 885, Syl. Pt. 8 (1953).

"When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Davis v. Mound View Health Care, Inc., __ W. Va. __, 640

S.E.2d 91, Syl. Pt. 2 (2006); State ex rel. Miller v. Stone, 216 W.Va. 379, 607 S.E.2d 485, Syl. Pt 2 (2004) (*per curiam*); State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488, Syl. Pt. 2 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."); DeVane v. Kennedy, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999) ("Where the language of a statutory provision is plain, its terms should be applied as written and not construed.").

Furthermore, the MPLA alters the common law and statutory rights of our citizens to compensation for injury and death. In other words, by its own terms, the entire MPLA is an act designed to be in derogation of the common law. Phillips v. Larry's Drive-In Pharmacy, Inc., __ W. Va. __, __ S.E.2d __ (2007) (filed June 28, 2007).

"Statutes in derogation of the common law are strictly construed." Kellar v. James, 63 W.Va. 139, 59 S.E. 939, Syl. Pt. 1 (1907). Statutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise than by necessary implication arising from such terms." Bank of Weston v. Thomas, 75 W.Va. 321, 83 S.E. 985, Syl. Pt. 3 (1914). "Where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law." Phillips v. Larry's Drive-In Pharmacy, Inc., at Syl. Pt. 5 (2007). Therefore, the MPLA must generally be given a narrow construction.

The MPLA cap on noneconomic damages is expressly limited to "medical professional liability action(s)." W. Va. Code § 55-7B-8. "Medical professional liability" is statutorily defined as any liability "based on health care services rendered...to a patient." W. Va. Code § 55-7B-2(d). The precise meaning of this statutory definition is clear:

> Upon reading the definition of "medical professional liability" contained in W.Va. Code § 55-7B-2(d), we are not left with the impression that its terms are ambiguous, confusing or capable of more than one interpretation. Simply stated, this provision recognizes a health care provider's legal responsibility for damages,

> in tort or in contract, to a person who has sustained injuries or death as a result of such provider's provision of, or failure to provide, health care services to a patient.

Osborne v. United States, 211 W. Va. 667, 672, 567 S.E.2d 677, 682 (2002). The clear and unambiguous meaning of the words "rendered...to a patient" imports direct patient care and treatment. To hold otherwise renders these words mere surplusage.

This conclusion is supported by the recent holding in Phillips v. Larry's Drive-In Pharmacy, Inc. wherein this Honorable Court held the MPLA does not apply to claims against a pharmacy because, *inter alia*, a "pharmacy does not have a hands-on independent medical relationship" with a patient. Phillips v. Larry's Drive-In Pharmacy, Inc., at p. 9 of 12. The Phillips Court quoted Indiana law[4] when it stated:

> In every relationship between a patient and one of the listed health care providers under Indiana Code section 34-18-2-14, independent medical treatment is an important component of the health care provided. This characteristic is lacking in the relationship between a pharmacist and a customer simply requesting that a prescription is dispensed.

Phillips v. Larry's Drive-In Pharmacy, Inc., at p. 10 of 12 (citations omitted). Likewise noted by the Circuit Court in the matter *sub judice*, **"individual patient care or treatment by agents jointly employed by WVUH and BOG is not at issue in this case."** See *Order Approving Partial Settlement with University of West Virginia Board of Trustees* at ¶5(e). Accordingly, the MPLA has no application in this case.

The evidentiary record confirms that the WVUH Department of Infection Control did not render care directly to Allison Riggs, nor was its liability premised on any such care. No member of the infection control staff examined Allison Riggs. No member consulted on her case. No member is identified in her patient chart. None from infection control "laid hands" on

[4] Indiana law defines "medical malpractice" as a "tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider to a patient." Indiana Code § 34-18-2-18 [1999].

Allison Riggs. No member rendered "independent medical treatment" Allison Riggs. These facts are undisputed.

Moreover, WVUH has taken the affirmative position on the record that it never provided medical care to Allison Riggs in the form of (1) a stipulation entered a month prior to trial; (2) testimony and argument presented during the trial; and (3) representations made to the Court during and after trial. WVUH went so far as to tell the jury it "had no idea who Allison Riggs was until this lawsuit was filed." (August 22, 2006 Trial transcript, pp. 143-44);

Appellants' statutory construction of the MPLA is supported by the maxim *expressio unius est exclusio alterius*, or the express mention of one thing implies the exclusion of another. Savilla v. Speedway Superamerica, LLC, __ W. Va. __, 639 S.E.2d 850 (2006). The Legislative decree that the MPLA noneconomic cap applies to health care "rendered ... to patient" implies the exclusion of those claims which do not involve direct patient care. The MPLA simply "does not apply to other clams that may be contemporaneous to or related to the alleged act of medical professional liability." Boggs v. Camden-Clark Memorial Hosp. Corp., 216 W.Va. 656, 609 S.E.2d 917, Syl. Pt. 3 (in part) (2004). If the Legislature intended the cap on noneconomic damages to apply to **all** health care services, and not just health care rendered to a patient, then it would have so written.

In Boggs v. Camden-Clark Memorial Hosp. Corp., 216 W.Va. 656, 609 S.E.2d 917 (2004)[5], this Honorable Court considered whether the MPLA screening certificate provision

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[5] The Boggs decision was "clarified" in Gray v. Mena, 218 W. Va. 564, 625 S.E.2d 326 (2005). Justice Davis comments in her concurring opinion that the clarification was unnecessary because "Boggs did not exclude intentional torts from the protections of the MPLA." Nonetheless, the ostensible clarification aptly makes an important point:

> *Boggs* is of limited assistance in formulating a resolution of the present case since the fraud, destruction of records and spoliation of evidence claims did not arise within the course of an actual physical examination. In the present case [*Gray v. Mena*], it is the action of the physician in the context of an ostensible examination that is at issue.

Gray v. Mena, 218 W. Va. at 569, 625 S.E.2d at 331, fn.6 (parenthetical inserted). This distinction is further supported by the recent Phillips v. Larry's Drive-In Pharmacy, Inc. case which notes the importance of a "hands-on relationship" between a health care provider and a patient. As argued repeatedly herein, the Riggs trial does not

applies to claims contemporaneous or related to health care. To resolve the question, the Boggs Court announced a new syllabus point:

> The West Virginia Medical Professional Liability Act, codified at W. Va.Code § 55-7B-1 *et seq.*, applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability.

Boggs v. Camden-Clark Memorial Hosp. Corp., at Syl. Pt 3. As the Boggs Court explained: "Fraud, spoliation of evidence, or ***negligent hiring***[6] are no more related to 'medical professional liability' or 'health care services' than battery, larceny, or libel. There is simply no way to apply the MPLA to such claims." Boggs v. Camden-Clark Memorial Hosp. Corp., 216 W.Va. at 662-63, 609 S.E.2d at 923 – 24 (***emphasis added***).

This Court has already drawn a clear dividing line. Health care rendered to a patient is governed by the MPLA. Health care which is "contemporaneous to or related" to direct patient care which does not involve "independent medical treatment" is not governed by the MPLA. Such contemporaneous acts falling outside the parameters of the MPLA include pharmacy claims (Phillips), negligent hiring claims (Boggs) and negligent infection control claims (Riggs). All are related to health care. None involve independent medical treatment and/or care rendered to a patient. Consequently, Appellants claims directed against the WVUH Department of Infection Control fall outside the parameters of the MPLA noneconomic cap.

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involve independent medical treatment nor a "hands-on" relationship between the WVUH Department of Infection Control and Allison Riggs.

[6] An example of a "negligent hiring" or negligent credentialing case can be found at State ex rel. Charles Town General Hosp. v. Sanders, 210 W.Va. 118, 556 S.E.2d 85 (2001).

V. CONCLUSION AND PRAYER FOR RELIEF

The MPLA significantly curtails the common law right to compensation for the victims of medical malpractice. Such a derogation of the common law should be narrowly construed. The issue on appeal may be resolved by a simple, but accurate, theorem of proof:

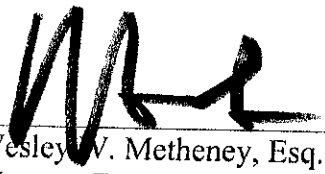
(a) the MPLA noneconomic cap applies to claims involving health care rendered to a patient;

(b) WVUH stipulates and concedes that the claims asserted by Appellant do not involve health care rendered to a patient; therefore

(c) the MPLA noneconomic cap does not apply to Allison Riggs' claim.

Your APPELLANT respectfully requests this Honorable Court to interpret and apply the MPLA noneconomic cap to give meaning to the words as written and reinstate the jury verdict. No more, no less.

RESPECTFULLY SUBMITTED,
ALLISON J. RIGGS and
JACK E. RIGGS, M.D.,
By Counsel



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APPENDIX A

WestVirginiaUniversityHospitals

July 19, 2006

VIA FACSIMILE & REGULAR MAIL

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RE: ***Allison J. Riggs, et al. v. West Virginia University Hospitals, Inc. Monongalia County Civil Action No. 01-C-147***

Dear Counsel:

I have reviewed the settlement agreement drafted by plaintiffs' counsel and have discussed with Mr. Galeota the changes to be made to the agreement. On behalf of West Virginia University Hospitals, Inc. (WVUH), I do not intend to object to the terms of the settlement as proposed *provided* that any order approving the settlement agreement between plaintiffs and the West Virginia University Board of Governors (BOG) include the following express limitations concerning WVUH's agency relationships with the healthcare providers whose conduct is at issue in this case:

- Any stipulation or representation entered into by WVUH regarding joint employment of agents by WVUH and the BOG is limited to Rashida Khakoo, M.D. and Bonny McTaggart, R.N., specifically.

- Any stipulation or representation entered into by WVUH regarding joint employment of Rashida Khakoo, M.D. and Bonny McTaggart, R.N. by WVUH and the BOG is limited to the infection control functions performed by these two individuals during the time period 1994 to 1996, specifically.

- WVUH does not stipulate or represent that any other person is jointly employed by WVUH and the BOG.

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WestVirginiaUniversityHospitals

- The stipulation regarding the joint employment of Rashida Khakoo, M.D. and Bonny McTaggart, R.N. by WVUH and the BOG is limited to this matter, and this matter only, given the unique allegations made by plaintiffs and plaintiffs' expert witnesses.

- Inasmuch as Rashida Khakoo, M.D. did not provide medical care or treatment to plaintiff Allison Riggs, and inasmuch as Bonny McTaggart, R.N. did not provided nursing care or treatment to plaintiff Allison Riggs, individual patient care or treatment by agents jointly employed by WVUH and the BOG is not at issue in this case. There is no stipulation concerning, and WVUH specifically denies, any co-employment or other agency relationship with Rashida Khakoo, M.D. or Bonny McTaggart, R.N. with respect to individual patient care or treatment rendered to any patient by either of these individuals at any time.

- There is no stipulation concerning, and WVUH specifically denies, any co-employment or other agency relationship with William Post, M.D. at any time.

If these express limitations are unacceptable to the settling parties, my client will have no choice but to object to the settlement agreement as drafted.

It is my understanding that the hearing to approve the settlement agreement has been rescheduled to August 10, 2006 at 8:45 a.m.

Very truly yours,

Christine S. Vaglienti

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CERTIFICATE OF SERVICE

I, Paul T. Farrell, Jr., Esq., do hereby certify that I have filed and forwarded by United States Mail the **"Brief of the Appellant"** and served the same upon the following counsel of record by mailing a true copy thereof, by United States mail, postage prepaid on this 28th day of June, 2007:

Christine S. Vaglienti, Esquire
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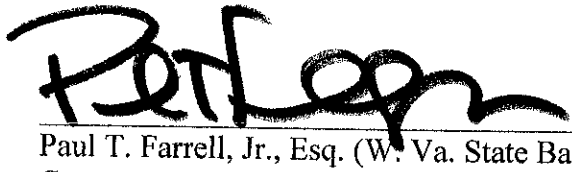
Counsel for West Virginia University Hospitals, Inc.

An original and nine (9) copies have been filed with the Clerk of the Supreme Court.



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